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AN INTRODUCTION
TO THE STUDY OF
MAHOMEDAN LAW

BY

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PREFACE

THIS is a reprint of an article that appeared in the *Muslim University Journal* for July 1931, and is in substance the first of a series of lectures on Mahomedan Law delivered in the Government Law College, Bombay, during the term November 1930 to March 1931. It is primarily intended for students entering upon the study of Mahomedan Law, and contains a brief summary of such historical facts and first principles of Muslim Law—*Shari'at* or *Fiqh*—as seem to be necessary for a proper appreciation of the law as it stands in India today. An attempt has been made to avoid unnecessary technicalities and unimportant details, to use the latest published sources of information, as far as they are available in Bombay, and to give some account of Shi'ite doctrines, a subject which has hitherto been very much neglected. Thus it may perhaps be of interest to the general reader also.

My gratitude is especially due to Maulvi Muhammad Yunus Haindaday, Advocate, Mr. W. Ivanow, Professor Muhammad Habib of Aligarh, and Mr. Saif F. B. Tyabji, Solicitor, for reading the manuscript and making many valuable suggestions; to Mr. J. Roy and many other friends for reading the proofs; and to my wife for unfailing help and encouragement.

A. A. A. F.

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O ye who believe ! be ye steadfast in justice, witnessing before God though it be against yourselves, or your parents, or your kindred, be it rich or poor, for God is nearer akin than either.

Qur'an, iv. 134

INTRODUCTORY

MAHOMEDAN LAW is widely taught and studied in our universities. It is invariably one of the subjects for the examination of the degree of Bachelor of Laws, and yet one finds that there are very few suitable text-books on it which can be placed in the hands of the student. A brief but systematic treatment of Mahomedan Law as a whole, with an introduction giving a summary of the basic facts discovered in the light of modern research, is a thing greatly to be desired. It is a mater for regret that a book like Juynboll's *Handbuch des islamischen Gesetzes* is not available to us in English.

If the need of a proper treatment of Mahomedan Law is great, the need for an adequate *introduction* to a study of the personal law applicable to Muslims in India is greater still. Except in Abdur Rahim's *Muhammadan Jurisprudence,* which is much too large a book to be offered to the average student, there is nowhere to be found an introduction to Mahomedan Law giving us a glimpse of pre-Islamic Arabia, then telling us how the religion of Islam came to modify Arabian notions of custom and law, and how finally the science of Jurisprudence in Islam, called *Fiqh,* arose. An attempt is made in the following pages to summarize briefly the facts which a student should know before dealing with the personal law of the Muslims.

Now first, an apology for the term 'Mahomedan' Law. This ugly term as well as its variants Moohummudun (Bailie), Muhammadan (Abdur Rahim and Tyabji), Mahommedan (Ameer Ali), Anglo-Muhammadan (Wilson), Mohammedan (Nicholson), and occasionally Mussalman (various Indian Acts), are all open to serious objection. Strictly speaking, the religion taught by the Prophet was Islam, not Mahomedanism; and the persons who believe in it are Muslims, not Mahomedans. The system developed by the Muslim doctors is *Fiqh,* and I

wish to make it clear that I use the term 'Muslim Law' synonymously with it. 'Mahomedan Law' is, however, a useful expression so far as India is concerned; for here, as in many other countries, *not* the whole of the *Fiqh*, but only a certain part of it, is applied to the Muslims. By Mahomedan Law, therefore, I mean *that portion of the Muslim Civil Law which is applied in British India to Muslims as a personal law.* And in choosing the spelling, I have tried to please, as far as possible, the old lady referred to by Fowler and am afraid to be branded as a pedant by her[1] I also have the satisfaction of having the Judicial Committee of the Privy Council on my side.

§ 1. PRE-ISLAMIC ARABIA

The Beduin of the desert has changed but little in the two or three thousand years within historic memory. A true son of the desert, the influences of nature have left upon his character an indelible mark. The climate of the desert is inhospitable in the extreme, and water is scarce, the burning sun and the hot sands are things to which he has to grow accustomed. We in the cities can hardly realize the degree of hardship which the denizens of the desert have to suffer. In towns there are roads and streets, but in the desert the rising and the setting sun and the shadows it casts by day, and the position of the moon and the stars by night, are the sole guides. The Arab roams about in the desert sands in search of water or pasturage, and in doing so the spirit of independence and freedom is born in him. Face to face with hardship he develops characteristics which are peculiar to the desert nomads. If his land is inhospitable, he considers hospitality one of the greatest virtues. Courage and bravery are qualities greatly admired by everyone who is either free or nobly born. No abuse can be greater to the Arab than to call him a coward. Arab hospitality and Arab bravery are proverbial. An Arab takes a peculiar

[1] Fowler, *Modern English Usage*, s.v. '*Mahomet*'.

pride in his lineage, and in case anyone of his line or tribe is hurt or killed, he considers revenge almost a religious duty. Vendetta is the Arab's master passion.

He loves his animals, his sheep and camels and horses, with the love of an idyllic nature. And yet, in the picturesque phrase of Sprenger, the Beduin is a parasite of the camel.[1] In the pre-Islamic poetry that has been handed down to us, beautiful descriptions of animals abound. The horse, the camel and the gazelle, each one of them is painted with delight by the poet.

And what were the chief joys of an Arab? How did he live? What were his pastimes and his duties? The best answer to this question is contained in the immortal lines of the *Mu'allaqa* of Tarafa where he says:

Canst thou make me immortal, O thou that blamest me so
For haunting the battle and loving the pleasures that fly?
If thou hast not the power to ward me from Death, let me go
To meet him and scatter the wealth in my hand, ere I die.

Save only for three things in which noble youth take delight,
I care not how soon rises o'er me the coronach loud:
Wine that foams when the water is poured on it, ruddy, not bright,
Dark wine that I quaff stol'n away from the cavilling crowd;

And then my fierce charge to the rescue on back of a mare
Wide-stepping as wolf I have startled where thirsty he cowers;

[1] Lammens, *Islam* (English translation), 3.

And third, the day-long with a lass in her tent of goat's hair
To hear the wild rain and beguile of their slowness the hours.[1]

In other words—wine, woman and war.

As a race, the Arabs are at once the most ancient, as they are in many ways the purest, surviving type of the Semites. It cannot be decided with certainty whether their tongue is the most ancient of the Semitic languages, but compared with other languages in the same group, classical Arabic is very rich in grammatical forms and preserves intact many very ancient philological usages. It possesses a rich and varied literature, of which the Arabs are justly proud. They consider their mother tongue the best of all the languages. Physically the Arabs are one of the strongest and noblest races of the world. Baron de Larrey, surgeon-general to Napoleon, remarks: 'Their physical structure is in all respects more perfect than that of the Europeans; their organs of sense exquisitely acute, their size above the average of men in general; their figure robust and elegant, their colour brown; their intelligence proportionate to their physical perfection and without doubt superior, other things being equal, to that of other nations.'[2] They used to be very defective in organizing power and incapable of combined action. The Prophet, however, put new life into them, and one of the most remarkable achievements of Islam was to unify the warring tribes and inspire them with a common ideal.

In trying to study the social condition of the ancient Arabs it is necessary to realize the position of women in pre-Islamic Arabia. Muslim authors as a rule maintain that the position of women at the time of the Prophet was

[1] Nicholson, *Translations from Eastern Poetry and Prose*, p. 8.

[2] *Ency. Brit.*, 13th ed., ii, 284, s.v. 'Arabs'; see also 'Semitic Languages' for linguistic information; and for a general account of Arabia, cf. 'Arabia' in *Ency. of Islam.*

no better than that of animals: they had no legal rights; in youth they were the goods and chattels of the father; after marriage the husband became their lord and master. Polygamy was universal, divorce was easy and female infanticide was common.[1] European scholars generally, following Goldziher and Sir Charles Lyall, are of opinion that this picture is overdrawn. They maintain that Islam robbed Arabian woman of her ancient liberty; and relying on the poetry and proverbs of the days of *Jahiliya* they show that the ideal Arab woman was an embodiment of modesty, fortitude, virtue and beauty, and that the men honoured and respected her.[2] They further show that the word *Jahiliya* does not mean the period of 'ignorance' but rather of 'wildness' or 'intrepidity'.[3]

The real explanation seems to be that about a hundred years prior to the Prophet, when the classical poets wrote, Arabia was civilized to some extent; that civilization slowly disappeared; the Arabs of the desert forgot all forms of religion and morality; and idolatry of a crude type generally prevailed. Thus the time was peculiarly ripe for the acceptance of a simple and rational faith like Islam, which gave to women many very important rights.[4] In *Moonshi Buzloor Raheem* v. *Shamsoonissa Begum*, Sir James Colville, delivering the judgment of the Privy Council, gave expression to the following views: 'The Mahomedan Wife, as has been shown above, has rights which the Christian—or at least the English—Wife has not against her Husband.'[5]

[1] Abdur Rahim, *Muh. Jur.*, 9 *et seq.*

[2] Lyall, *Ancient Arabian Poetry*, Introduction, p. xxxi; Nicholson, *Literary History of the Arabs*, 1st ed., 87 *et seq.*; Smith, *Rabi'a the Mystic*, 111; *Ency. Brit.*, 13th ed., ii, 284, s.v. 'Arabs'.

[3] *Jahl* is opposed to *hilm* (kindness, consideration, restraint) and not to *'ilm* (knowledge). This was proved long ago by Goldziher—Nicholson, *Lit. Hist.*, 1st ed., 30.

[4] Ameer Ali, *Spirit of Islam*, 2nd ed, 255-256.

[5] 1867, 11 Moore's Ind. App., 551, 612

§2. ANCIENT ARABIAN CUSTOMS

We must now consider whether law, or custom having the force of law, existed in ancient Arabia. In pre-Islamic times law proper, as we understand it today, was unknown. Tribes and chieftains acted in accordance with tradition and convention. Abdur Rahim in his *Muhammadan Jurisprudence*[1] has examined a large number of such customs and many of them are interesting from a comparative point of view. It will be observed how in many institutions, marriage for example, there is a curious similarity between some pre-Islamic Arab customs and some kinds of marital relationship known among the ancient Hindus. Apart from this, we shall find many of these customs adopted wholly or with modifications by the law of Islam. One of the most striking of such examples is the principle of agnacy or *ta'sib,* which is apparent in the Sunnite law of inheritance.[2]

At the time of the advent of Islam, Arab society was generally nomadic. No settled form of government or administration of law existed. The population consisted of two classes: there were the desert nomads who led a more or less roving life and were called Beduins, and there were the town-dwellers who to some extent led a more settled form of existence. The tribe was the principal unit, and therefore the tribal chief exercised great power and influence. Generally he was elected because of his nobility of birth or wisdom or courage. There was no regular manner in which his behests were carried out; he relied mainly on the force of his character and tribal opinion. The commonest offences were tribal; for example, one member of a tribe killing a member of another tribe. In such circumstances the chief of the tribe that had suffered would call upon the leader of the offender's tribe to surrender the criminal so that he might suffer the penalty of death. If the tribes were friendly, some sort of arrange-

[1] *Tagore Law Lectures,* 1907, pp. 2-16.

[2] Tyabji, *Muh Law,* 2nd ed, 818 *et seq* Tyabji's exposition of the law of inheritance is now recognized as of great value.

ment was arrived at; if not, there would be guerilla warfare between them. In certain cases blood-money was fixed, and the offender's tribe had to pay a price in consonance with the dead man's position. Generally speaking two kinds of custom having the force of law may be recognized: inter-tribal customs, and customs which regulated the relation of the individual to his own tribe. We are mostly concerned with the latter class.

We have not much knowledge of the procedure followed in deciding cases. Generally the plaintiff had to substantiate his claim. If he had no evidence, the defendant, if he denied the charge, would be given the oath; and on taking it, he would be absolved from all liability. Occasionally, diviners were consulted, and torture was also resorted to. Oaths were held in great reverence, and were often used for settling disputes.[1]

Among the most interesting of ancient Arabian customs were those that regulated the relations between the sexes and the filiation of children. Side by side with the regular form of marriage, various other connexions between members of the opposite sex were common. Abdur Rahim, citing the *Kashfu'l-Ghumma,* tells us of four types of Arabian marriages:[2] (i) A form of marriage similar to that sanctioned by Islam; a man would ask another for the hand of his daughter or ward, and then marry her by giving her a certain dower. (ii) A man desiring noble offspring would ask his wife to send for a great chief and have intercourse with him. During the period of such intercourse the husband would stay away, but return to her after pregnancy was well advanced. (iii) A number of men, less than ten, would be invited by a woman to have intercourse with her. If she conceived, and was delivered of a child, she had the right to summon all the men and they were bound to come. She would then say, 'O so and so, this is your son'. This established paternity conclusively and the man had no right to disclaim it. (iv) Common prostitutes were

[1] Abdur Rahim, *Muh. Jur.,* 6.
[2] ibid., 7.

well-known. They used to have a definite number of visitors and their tents had a special flag as a sign of their calling. If a woman of this class conceived, the men who frequented her house were assembled, and the physiognomists decided to whom the child belonged.

Mut'a or temporary marriage was a common practice. From a study of Hadith it would seem that *Mut'a* was tolerated by the Prophet in the earlier days of Islam, but later on he prohibited it.[1] It is to be noted that only one school of Mahomedan Law, the Ithna 'Ashari, allows such marriages today. Not only the Sunnite schools but all the other Shi'ites, notably the Isma'ilis and Zaidis, consider such marriages illicit.[2]

Most of the conjugal relations described above can hardly be called 'marriages' in the modern acceptation of the term. It is more appropriate today to consider them as forms of legalized prostitution or of irregular sexual behaviour. The second form of marriage mentioned by Abdur Rahim reminds us of the ancient Hindu practice of *Niyoga*. Widely different peoples have, it seems, possessed, in times past, similar institutions before coming to the modern—and not merely the Christian—idea of marriage, 'the voluntary union for life of one man and one woman, to the exclusion of all others'.[3]

Dower was one of the necessary conditions of marriage in the regular form. But the amount was paid more often to the guardian or the father than to the woman herself, and for this reason the marriage contract was for all practical purposes a sale.[4] In Islam, however, *Mahr* is a bridal gift and the idea of sale has entirely disappeared. The husband could avoid his liability to pay dower in various ways. A man would give his daughter or sister in marriage to another in consideration

[1] Wensinck, *Early Muh Tradition*, 145.

[2] *Majmu'u'l-Fiqh*, ed. Griffini, § 718; and Fyzee in (1931) 33 Bom. Law Rep. Jl., 30.

[3] Dictum of Lord Penzance in *Hyde* v. *Hyde* adopted and approved recently in *Nachimson* v. *Nachimson* [1930] P. 85 and 217.

[4] '*Mahr*' in *Ency. of Islam*, iii, 137; Tyabji, § 92.

of the latter giving his daughter or sister in marriage to the former. This was called *Shighar*.[1] In this case no dower was paid. Unchastity on the part of the wife was also a reason for debarring her claim for dower. A false charge was, therefore, sometimes brought against her and her dower forfeited before divorce.

Woman was never a free agent in marriage. It was the father or other male guardian who gave her in marriage, and her consent was of no moment. There was no limit to the number of wives a man could have. Divorce was a matter of a few words, and there were many forms of dissolution of marriage, some of which have been adopted by Islam.

The Arabian law of property has very little practical value now, and therefore we shall pass on to inheritance and succession. An Arab could dispose of all his property by will. He could in many instances cut off his nearest relations. In the law of inheritance the cardinal rule was that no female could take; only the males inherited, and even among males, only agnates, such as son, father, grandfather, brother, cousin, etc.; cognates were entirely excluded. These were the first class of heirs. The second class consisted of adopted sons and relations, who stood on the same footing as natural-born sons. The third class consisted of heirs by contract. Two Arabs, for services rendered to each other or for mutual affection, would enter into a contract that in the event of the death of the one the other would succeed to his estate.[2] This brief summary of pre-Islamic customs will suffice to show how far-reaching and humane were the reforms brought about by the Prophet and the religion he taught.

§ 3. ADVENT OF ISLAM

At the time of the Prophet and just before he preached the new faith, we can distinguish several kinds of religious belief in Arabia. None of them was of an advanced type. First let us consider ancient Arabian paganism or

[1] Abdur Rahim, *Muh. Jur.*, 8.
[2] ibid., 15.

heathenism. 'The paganism of the Arabs was in general of a remarkably crude and inartistic kind, with no ritual pomp, no elaborate mythology and, it hardly needs be said, no tinge of philosophical speculation.'[1] Strictly speaking, this paganism was not a fixed system at all; on the one hand, the most primitive beliefs were akin to animism and totemism; and on the other, the religion of the more advanced Arabs bore a great resemblance to that of the ancient Sabæans.[2]

Then we come to organized religion; there were colonies of Christian sectarians in the north and also at Najran in the south, Jewish communities were to be found in the north-west, and Zoroastrian communities in the neighbourhood of the Persian Gulf. It must be pointed out here that in the majority of cases, it was merely the outward form, the traditional ritual of each faith, that was preserved. The people had forgotten much of the knowledge of their religion and lost contact with spirituality. In their heart of hearts, they remained true sons of the desert; believing in free love, considering vengeance a sacred duty, loving a life of pleasure; wild, passionate, hospitable; and above all, freedom-loving and courageous.

We now come to a most interesting and significant fact: significant because in some ways it explains and anticipates the birth of Islam. Round about Mecca there grew up a colony of men who were dissatisfied with the prevailing forms of worship and belief, who were monotheistic and devoted themselves to religious meditation. These persons were called *Hanifs*, a term of which the precise meaning and origin are obscure. The *Hanifs* hardly formed a community of their own and our information

[1] Prof. A. A. Bevan on 'Mahomet', *Camb. Med. Hist.*, ii, 302, 303. This is the best short account of the Prophet from the pen of a non-Muslim critic that we have.

[2] The Sabæans were half Christian and half heathen; they are to be distinguished from the Sabians, *Sabi'un*, a name given to the earliest followers of the Prophet. *Camb. Med. Hist.*, ii, 309.

concerning them is, unfortunately, extremely meagre; nor do we know for certain what their relations were with the earliest converts to Islam.[1]

This then was the background when the Prophet preached his religion. It is not my purpose to give here any detailed exposition of the tenets of Islam. But this faith has a particular appeal to the modern mind. It is truly a socialistic and a democratic creed: socialistic, because it compulsorily divides the estate of a person after his death and distributes it among his nearest relations, male and female; democratic, because it preaches equality among human beings and the brotherhood of man. Now as in Islam laws are intermixed with religion, a few words must be said regarding its basic principles, failure to understand which would mean failure to appreciate the true spirit of Islam. The French proverb, 'to understand is to forgive', is never truer than in matters concerning religion.

The first thing that we must realize is that the Prophet himself never claimed that Islam was a new religion. He asserted, on the other hand, that it was as old as the hills. Islam is a word which in Arabic means 'submission to the will of God', and from the way in which the verb *aslama* (lit. he submitted) is used in Arabic, it appears that it further signifies the *deliberate adoption* of a new faith.[2] In Muslim theory Islam is a religion which has existed since the beginning of the world and will exist till the day of Resurrection. From time to time this religion is corrupted. People forget the principles of the true faith, and God in His infinite mercy sends to them a Reformer, a Rasul or a Messenger, in order that he may point out the way and warn the people. Such were Adam, Abraham, Ismail, Moses and Jesus the son of Mary. Such was also Muhammad, the son of 'Abdullah, who claimed that he was merely a man like

[1] '*Hanifs*' in *Ency. of Islam*, ii, 258; and *Camb. Med. Hist.*, ii, 306.

[2] Prof. Bevan, *Camb. Med. Hist.*, ii, 309, ftn. 1.

others, liable to err in human affairs, but divinely guided and inspired in matters of religion.[1]

The next principle of the utmost importance is *Tauhid* or the dogma of the unity of God. If there is one thing in which Islam will not temporize or compromise, it is the dogma of the absolute unity of God. The religion of Islam is essentially monotheistic, the religion of one God in direct contradistinction to the ancient Arabian polytheism or paganism. The doctrine of *Tauhid,* because of its immutability, is, according to Iqbal, the principle of permanence in the world of Islam.[2]

The third principle which we must note is *Brotherhood.* From the practical point of view, the principle of brotherhood which Islam has preached—and not only preached but made real—is one of its greatest glories. Almost all religions have taught brotherhood in different ways, but no religion in history can boast of having made brotherhood so real and actual in everyday life. In his last sermon, the Prophet told his people that excellence consisted only in deed. Pride of colour or race was utterly condemned. 'The Arab is not superior to the non-Arab; the non-Arab is not superior to the Arab. You are all sons of Adam, and Adam was made of Earth. Verily all Muslims are brothers. . . . If a deformed Abyssinian slave holds authority over you and leads you according to the Book of Allah, hear him and obey.' Nowhere has the true spirit of Islam been so tersely summarized as in this the last speech of the founder of Islam.[3]

As students of law, we would do well to consider the striking tribute which has been paid to Islam by a great European authority on Muslim law, Count Léon Ostrorog, in concluding his lectures on *The Angora Reform* in the University of London: 'However that may be, Islam, with its glorious history, its magnificent literature, its simple,

[1] Wensinck, *Early Muh. Tradition,* 168.

[2] Iqbal, *Reconstruction in Islam,* 207.

[3] Shibli, *Sirat,* ii, 118-132; *Islamic Culture* (Hyderabad), iii (1929), 77-79.

stoical tenets, will certainly remain, for many millions, at the very least an ideal, a moral doctrine, teaching men to be clean, abstemious, brave and charitable, proclaiming as fundamental commandment the noble Quranic verse: *Verily God commands you to be just and kind!*—a religion, nothing more, but such a religion that even those who do not profess it, but have studied it with a certain care, render it the tribute of a deep sympathy and a profound respect.'[1]

§ 4. ORIGIN OF MUSLIM LAW

(A) *SHARI'AT*

Now coming to law proper, it is necessary to remember that there are two different conceptions of law. We may believe law to be of divine origin as is the case with the Hindu Law and the Muslim Law, or we may consider it as man-made. The latter conception is the guiding principle of all modern legislation; it is, as Ostrorog has pointed out, the Greek, Roman, Celtic or Germanic notion of law.[2] We may be compelled to act in accordance with certain principles because God desires us to do so, or, in the alternative, because the King or the Assembly of wise men or the leaders of the community or social custom demand it of us for the good of the people in general. Now taking the case of Hindu Law, it is based, firstly, on the Vedas, that is, *Sruti*, meaning 'that which is heard'; secondly, it is based on the *Smriti* or 'that which is remembered' by the sages or *rishis*. Although the effect of custom is undoubtedly great, yet *dharma*, as defined by Hindu lawyers, implies in reality a course of conduct which is approved by God.

Now, what is the Mahomedan notion of law? In the words of Mr. Justice Mahmood 'it is to be remembered that Hindu and Mahomedan Law are so intimately connected with religion that they cannot readily be dissevered from it'.[3] There is in Islam a doctrine of 'certitude'

[1] Ostrorog, *The Angora Reform*, 99.
[2] ibid., 15 *et seq.*
[3] *Gobind Dayal* v. *Inayatullah*, 7 All. 775, 781.

(*'ilmu'l-yaqin*) in the matter of Good and Evil.[1] We in our weakness cannot understand what Good and Evil are unless we are guided in the matter by an inspired Prophet. Good and Evil, technically as the Mahomedan doctors call it, *Husn,* beauty and *Qubh,* ugliness, are to be taken in the ethical acceptation of the term.[2] What is morally beautiful, that must be done; and what is morally ugly, must not be done. That is law or *Shari'at* and nothing else can be law. But what is absolutely and indubitably beautiful, what is absolutely and indubitably ugly? These are the important legal questions; and who can answer them? Certainly not man, say the Mahomedan doctors. We have the Qur'an which is the very word of God. Supplementary to it we have Hadith, which are traditions of the Prophet—the records of his actions and his sayings—from which we must derive help and inspiration in arriving at legal decisions. Now if there is nothing either in the Qur'an or in the Hadith to answer the particular question which is before us, we have to follow the dictates of secular reason *in accordance with certain definite principles.*

These principles constitute the whole basis of Canon Law or *Shari'at* as the Muslim doctors understand it. And it is these fundamental juristic notions which we must try to study and analyse before we approach the study of the Muslim Civil Law as a whole, or even that small part of it which in India is known as 'Mahomedan Law'.

Shari'at (lit. the road to the watering place, the path to be followed), as a technical term, means the canon law of Islam, the totality of Allah's commandments. Each one of such commandments is called *hukm* (pl. *ahkam*). The law of Allah and its inner meaning is not easy to grasp; and *Shari'at* embraces all human actions. For this reason it is not 'law' in the modern sense; it contains an infallible

[1] Ostrorog, *The Angora Reform,* 16.
[2] For a Shi'ite view see *al-Babu'l-Hadi 'Ashar* (trans. Miller), § 111.

guide to ethics. It is fundamentally a DOCTRINE OF DUTIES,[1] a code of obligations. Legal considerations and individual rights have a secondary place in it; above all, the tendency towards a religious evaluation of all the affairs of life is supreme.

According to the *Shari'at,* religious injunctions are of five kinds, *al-ahkam al-khamsa.* Those strictly enjoined are *Fard,* and those strictly forbidden are *Haram.* Between them we have two middle categories, namely, things which you are advised to do (*Mandub*), and things which you are advised to refrain from (*Makruh*), and finally there are things about which religion is indifferent (*Ja'iz*).[2] This fivefold division must be carefully noted. Unless this is done, it is impossible to understand the distinction between that which is only morally enjoined and that which is legally enforced. Obviously, moral obligation is quite a different thing from legal necessity, and if in law these distinctions are not kept in mind, error and confusion are the inevitable result. This has been forcibly pointed out by Mr. Justice Mahmood in the leading case of *Gobind Dayal* v. *Inayatullah.*[3]

(B) *FIQH*: SOURCES AND DEFINITION

We must now consider what law proper, *Fiqh,* is, and wherein, if at all, it differs from the *Shari'at.* It is said that the Prophet sent Mu'adh, one of his companions, as governor of a province, and also appointed him to be the distributor of justice. No trained lawyers existed then, and the Prophet asked:

'According to what shalt thou judge?'

He replied:

'According to the scriptures of God.'

[1] This was pointed out by Snouck Hurgronje, who, according to Goldziher, is the 'founder' of the historical criticism of *Fiqh* See *Ency. of Islam,* ii, 105.

[2] *Ency. of Islam,* s.v. '*Shari'a*', iv, 322; and *al-Babu'l-Hadi Ashar* (trans. Miller), § 113.

[3] 7 All. 775, 805.

'And if thou findest nought therein?'

'According to the tradition of the Messenger of God.'

'And if thou findest nought therein?'

'Then shall I interpret with my reason.'

And thereupon the Prophet said:

'Praise be to God who has favoured the messenger of His Messenger with what His Messenger is willing to approve.'[1]

This is a very important tradition because it shows that in law, independent judgment, *within certain limits,* is not only permissible but even praiseworthy. The Qur'an has to be interpreted, the actions and sayings of the Prophet considered, and judgment exercised in a particular manner in case the Qur'an and the Sunnat are silent on a particular point.

Fiqh literally means 'intelligence'. It is the name given to the whole science of Jurisprudence, because it implies the *independent exercise of intelligence* in deciding a point of law, in the absence or ignorance of tradition on the point. There is thus a difference between *'ilm,* knowledge, and *fiqh,* which requires the exercise of independent judgment. A man may be very learned, *'alim* (pl. *'ulama,* commonly called *ulema*), but to be a *faqih* or jurist he must have the quality of independent judgment. This at least was the original meaning. The terms *fiqh* and *fuqaha* may also have been suggested, as Goldziher shows, by the Latin terms (*juris*)*prudentia* and (*juris*)*prudentes.*[2] A study of the *Fiqh* also reveals clearly that elements of Roman, Jewish and Persian law are to be found in it.

We have now to see how the science of *Fiqh* is defined by the Mahomedan lawyers. *Fiqh* or the science of Muslim Law may be defined as *the knowledge of one's right and obligation derived from the Qur'an or Hadith, or*

[1] Ostrorog, op. cit., 21, Tyabji, *Muh. Law,* 2nd ed., 23.
[2] Goldziher on *'Fiqh', Ency. of Islam,* ii, 102

deduced therefrom, or about which the learned have agreed.[1]

Now if this definition is carefully examined, it will be found to contain not merely the first two sources of law, the Qur'an and the Traditions of the Prophet, but also two other legal doctrines. As regards Hadith or Tradition, in general, the distinction between Hadith, that is, the story of an eye-witness concerning the Prophet, and Sunnat, the practice of the Prophet, must be carefully noted. *Hadith* is the story as a whole; *Sunnat,* the practice deduced from it, is the rule of law. These terms are often used as synonyms, but this is inaccurate.[2] Going back to the definition, the knowledge which is deduced from the principles laid down in the Qur'an and Hadith may be by way of analogical deduction, and this in Muslim Law is called *Qiyas.* This is supposed to be the special characteristic of Hanafi Law; it allows the Imam, the founder of the school, to exercise his faculty of reasoning and to deduce principles in consonance with the word of God, and the actions and the words of His Prophet, and these rules therefore have the force of law.[3]

Then if we examine the last line of the definition, 'about which the learned have agreed', we will find another very important source of law, *Ijma'* or consensus of opinion among the learned. There is a well-known tradition of the Prophet to the effect that 'my people will not agree in error'.[4] Muslim doctors have formulated a legal doctrine from this tradition, which they call *Ijma'* or consensus. When a number of persons, who are learned in the Muslim Law and have attained the rank of jurists of some sort, agree on a particular legal question, then their opinion is binding and has the force of law. There are other sources of law also, such as *Istislah, Istidlal,* and *Istihsan,* which are needless for our present purpose. They are all modes

[1] Abdur Rahim discusses the term *Fiqh* in *Muh. Jur.,* 48

[2] *Ma'arif* (Azamgadh), 1929, vol. 24, p. 91.

[3] For a very good account of *Qiyas,* cf. Aghnides, *Mohammedan Theories of Finance,* Intr., 67 *et seq.*

[4] Abdur Rahim, *Muh. Jur.,* 115.

of reasoning alternative to *Qiyas*. For a full discussion of these sources we cannot do better than study Abdur Rahim's *Muhammadan Jurisprudence*, a book often cited above. Custom, *'Adat*, is also recognized as a source of law under certain circumstances.

While we are discussing the nature of *Fiqh*, it must also be pointed out that this science has been divided into two portions. The *Usul*, literally the Roots[1] of the Law, and the *Furu'*, the Branches of the Law. The science of *Usul* deals with the first principles of interpretation and may be likened to our modern Jurisprudence, while the science of *Furu'* deals with particular injunctions—*Ahkam*. technically—or the Substantive Law, as we would call it, which really follows from the science of *Usul*. It is, therefore, necessary to realize that in Muslim Law there is a very clear distinction between the first principles and the rules deduced from their application.

We have now seen what *Shari'at* is and what, in essentials, is the definition of *Fiqh*. What is the distinction, if any, between them? *Shari'at* is the wider circle, it embraces in its orbit *all* human actions; *Fiqh* is the narrower one, and deals with what are commonly understood as legal acts. *Shari'at* reminds us always of revelation, that *'ilm* (knowledge) which we could never have possessed but for the Qur'an or Hadith; in *Fiqh*, the power of reasoning is stressed, and deductions based upon *'ilm* are continuously cited with approval. The path of *Shari'at* is laid down by God and His Prophet; the edifice of *Fiqh* is erected by human endeavour. In the *Fiqh*, an action is either legal or illegal, *yajuzu wa ma la yajuzu*, permissible or not permissible. In the *Shari'at*, there are various grades of approval or disapproval. It must, however, be candidly confessed that the line of distinction is by no means clearly drawn, and very often the Muslim doctors themselves use the terms synonymously; for the criterion of all human action, whether in the *Shari'at* or in the *Fiqh*, is the same—

[1] Or 'foundations'.

seeking the approval of Allah by conforming to an ideally perfect code.

§ 5. DEVELOPMENT OF MUSLIM LAW

(A) Formation of Sunnite Schools: The Four Periods

Now I want very briefly to deal with the most important periods of the development of Muslim Law. Abdur Rahim, in his *Muhammadan Jurisprudence,* following the usual classification, divides the course of Mahomedan Law into four different periods. On the other hand, al-Khidri, in his history of *Fiqh,* divides the history of Muslim Law into six periods.[1] Personally I prefer the classification of al-Khidri, but for the sake of simplicity and because it is needless to enter into historical details concerning this particular question, the classification of Abdur Rahim is adopted here. It may be added that this classification is the one which is generally accepted.

The first period we have to consider is the period between A.H. 1 to 10, viz., the last ten years of the Prophet's life. This is the most important period so far as the first two sources of the law are concerned, the Qur'an and the Hadith. The Prophet had conquered Medina and Mecca, and in the last few years of his life he took upon himself the task of legislation. Most of the legal verses of the Qur'an were revealed at this time and some of his most important judicial decisions and traditions relate to that period. With reference to the binding force of tradition, it is convenient here to say a word about the theory of inspiration, *Wahy,* in Muslim Law. Inspiration may be of two different kinds.[2] It may be manifest (*zahir*) or it may be implied (*batin*). The verses of the Qur'an are express inspiration—in the theory of Islam they are the very words of God. The actions and the sayings of the Prophet stand on a different level.

[1] Muhammad al-Khidri (also pronounced, Khudri or Khudari), *Ta'rikhu't-Tashri'i'l-Islami,* 3rd ed., Cairo, 1930|1348, p. 4; abridged Urdu translation, *Tarikh-i Fiqh-i Islami,* by Maulana Abdus Salam (Azamgadh), A.H. 1346.

[2] Abdur Rahim, op. cit., 69 *et seq.*

In Muslim theory these actions and sayings were also inspired but the inspiration was implied, that is to say, we have to look to all the surrounding circumstances of a particular action or saying of the Prophet before we can arrive at the true principle behind it, and that principle was inspired in the sense that it also was suggested or commanded by God.

The next period of great significance from the point of view of the law is the period A.H. 10 to 40, that is to say, the thirty years of the orthodox Khilafat, the Khilafat (Caliphate) of the first four Caliphs or successors of the Prophet. The two things which we have to remember about this period are the close adherence to the practice, that is, the *Sunnat,* of the Prophet, and secondly, the collection and the editing of the text of the Qur'an, the final recension of which took place in the reign of 'Uthman, the third Caliph. It is that Qur'an—'Uthman's edition—which exists absolutely pure and without corruption to this day, and this may be called the authorized text.

The third period of Muslim Law which takes us from 40 A.D. to the third century of the Hijra is a period which is still more important, because in this period the work of collecting the traditions took place, and the collections of Bukhari and Muslim, for instance, came to be recognized as authoritative. During the earlier part of this period there appear the four schools of Sunnite law which are well known. Firstly, the school of Abu Hanifa (80|699 to 150|766), the oldest and, presumably, the most liberal of the four schools, the special characteristic of which is reliance on the principles of *Qiyas* or Analogical Deduction. Many scholars think that he was the founder of *Qiyas*; this is incorrect. He employed *Qiyas* more because the science of Hadith had not developed fully by that time, and no recognized collections were available. In essentials, his system does not differ from the others.[1]

[1] Juynboll in *Ency. of Islam,* i, 90.

The Kufa School of Imam Abu Hanifa is to be distinguished from the Medina School of Malik ibn Anas (90 or 97|713 to 179|795), the next in point of time, which closely followed the traditions of the Prophet, and did not place much reliance on *Qiyas*; the latter represents more the *Ijma'* and practice of Medina than any system worked out by Imam Malik alone. His chief book, the *Muwatta'*, is the oldest corpus of Sunnite law extant and is of interest because it forms a link between the *Fiqh* literature of earlier days and the Hadith collections of later times.[1]

The third school which we have to consider is the school of Imam Shafi'i (150|767 to 204|820). He was a pupil of Imam Malik and of Imam Muhammad, the pupil of Abu Hanifa. Modern critics place Imam Shafi'i very high as a jurist. He is generally regarded as the founder of the science of *Usul*; and he perfected the doctrine of *Ijma'*. 'Ash-Shafi'i may be described as an eclectic who acted as an intermediary between independent legal investigation and the traditionism of his time. Not only did he work through the legal material available, but in his *Risala*, he also investigated the principles and methods of Jurisprudence.'[2]

Finally we come to Imam Ahmad ibn Hanbal (164|780 to 241|855). Originally the pupil of Imam Shafi'i he represents the most extreme reaction from the school of what was called *Ahlu'r-ra'y*, 'the people of opinion', and strictly adhered to the principle of following the Hadith literally. He was a man of very saintly character and more of a traditionist than a lawyer; Tabari the historian refused to recognize him as a jurist (*faqih*), considering him a mere traditionist (*muhaddith*). Goldziher doubts whether he can be said to have founded a new school of law, but he is undoubtedly recognized as an Imam by the Sunnites.[3]

It must not be supposed that these were the only Imams or founders of the Law. There were others too

[1] Schacht in *Ency of Islam*, iii, 205.
[2] Heffening in *Ency. of Islam*, iv, 253
[3] Goldziher in *Ency. of Islam*, i, 188.

who attained the rank of Imam or Mujtahid, but whose schools did not last long; such were Da'ud ibn 'Ali az-Zahiri, al-Auza'i' Sufyan ath-Thauri and Abu Thaur.[1]

The vast majority of Muslims in India, Turkey and Egypt are Hanafis. The Shafi'is are represented on the coast-line of Arabia, in India, and in certain other parts of the world. For instance, the Koknis of Bombay, the Moplahs (Mapillahs) of Malabar, the Moors of Ceylon and the Arabs in Java are all Shafi'is. North Africa, the *Maghrib* of the Muslim authors, is wholly of Maliki persuasion. We have no Malikis in India. The so-called Wahhabis, the followers of Ibn Sa'ud, Sultan of Najd, are really Hanbalis; except in the centre of Arabia, as leaders in a puritanical movement, the Hanbalis are nowhere else to be found.[2]

(B) Evolution of *IJTIHAD* and *TAQLID*

We now come to the fourth and last period, a period not only long and varied, but also a time of general decadence. It extends from the third century of the Hijra to the present day. After the four recognized schools had been founded, later scholars applied themselves to the methods laid down by the founders and developed each system in a particular manner; but no individual jurist was ever afterwards recognized as having the same rank as the founder himself. On the one hand the doctrine of *Taqlid* (following or imitation) came into prominence; on the other, the limits of *Ijtihad,* the power of independent interpretation of law, were carefully laid down. The earlier jurists had greater powers; the later ones could not cross the barrier and were classified as of lower and lower rank. The classification of the lawyers of this period is very elaborate; seven different grades are recognized, beginning from the Imams as founders down to the ordinary jurisconsult or *Mufti.*[3] Practically, in every case the later

[1] Aghnides, op. cit., 133.
[2] *Ency. of Islam,* ii, 104.
[3] Aghnides, op. cit., 121-123; Abdur Rahim, op. cit., 168, 182 *et seq.*

lawyers were considered lower in grade; until, after a time, no exercise of independent judgment was permitted at all.

We must now consider the doctrines of *Ijtihad* and *Taqlid*. *Ijtihad* literally means 'exerting one's self to the utmost degree to attain an object', and technically, 'exerting one's self to form an opinion in a case or as to a rule of law'.[1] In the early days of Islam many persons were known as *Mujtahids* or those who exercised independent judgment; but this power was cut down by the parallel doctrine of *Taqlid*. '*Taqlid*' (literally, imitation) means 'following the opinion of another person without knowledge of the authority for such opinion'.[2] A Muslim had to follow the Law; every man in the street could not be learned in the rules of *Shari'at*; being ignorant, he was asked to follow the opinion of those who knew better. Those who knew better, the '*Ulama*, were denied independence of judgment in any vital matter. Hence the vicious circle of *Taqlid*.

There is nothing, as Abdur Rahim has shown, in the theory of Islam to force the principle of blind imitation on the Muslims.[3] In fact, it is only due to political and other causes that they still consider themselves bound by older views, while the letter of the law allows them liberty to develop their system of jurisprudence. Therefore, to say that legally no one can have the rank of *Mujtahid* at present is wrong; the practical difficulty, however, that there is no chance of anybody's being recognized as such today, remains. Unless a bold step is taken, as suggested recently by that profound thinker, Dr. Iqbal, in his *Reconstruction in Islam*, the Shari.at will remain a fossil.[4] He suggests that the principles of *Ijma'* should be applied and that the power of *Ijtihad* should reside not in one individual, but in a body of learned Muslim scholars of advanced views,

[1] *Ency. of Islam*, ii, 448; Abdur Rahim, op. cit., 168. It is not a mode of reasoning or a source of law as suggested by Tyabji, 2nd ed., Intr., 25.

[2] Abdur Rahim, op. cit., 171.

[3] ibid., 173.

[4] Pp. 242-244.

who may interpret the law so that it falls in line, as far as possible, with modern legal and social ideas. Efforts in this direction are being made in Egypt by the *Salafiya* or Reformers.

§ 6. THE SHI'A

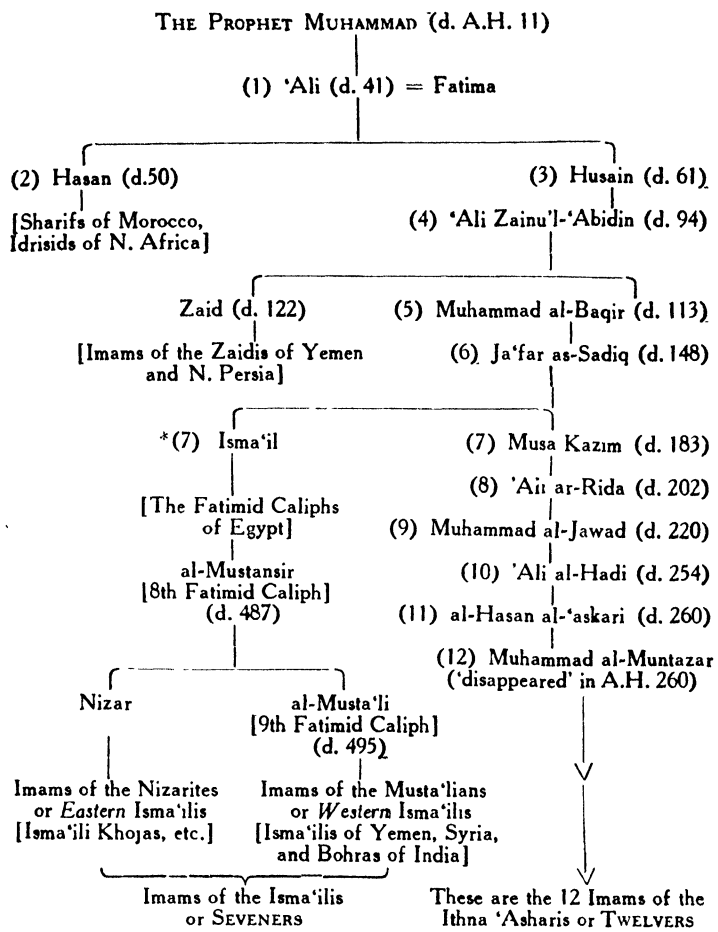
History and Sub-Schools

We must now proceed to consider what is generally known as the Shi'ite Law.[1] This requires separate treatment, particularly because very few authorities give adequate information concerning it. The term *Shi'a* by itself means 'party', and being an abbreviation of the term *Shi'at 'Ali,* it means specifically that party which, after the death of the Prophet, attached itself to 'Ali, the son-in-law of the Prophet, considering him the successor of the Prophet both in temporal and in religious matters, and denying the rightful succession of the first three Caliphs.[2] Out of 250 million adherents of the Islamic faith, the Shi'ites number about 20 million. This works out at about eight per cent.[3] The Shi'ites may be divided into a large number of sub-schools, the two most important of which, so far as India is concerned, are the *Isma'ilis* and the *Ithna 'Asharis.* I give below a short pedigree of the first Imams in order to make things clear:—

[1] The term *Shi'a* is a noun and cannot be used as an adjective. The terms 'Shia law', 'Shia books', 'Shia tenets' and 'Shias' are, therefore, all objectionable. The correct forms would be 'Shi'i or Shi'ite' law, etc. and Shi'is or Shi'ites. Cf. 'Sunna' and 'Sunni' or 'Sunnite', for example.

[2] There is no thorough account of the Shi'a, but the best summary of what is known is by Strothmann in *Ency of Islam,* iv, 350, s.v. 'Shi'a'.

[3] L. Massignon, *Annuaire du Monde Musulman,* 3rd ed., 1929, pp. 24 and 38. For slightly differing figures, see H. Lammens, *Islam: Beliefs and Institutions* (trans. into Eng. by E. Denison Ross), pp. 149 and 221. In *Islamica* (1926), ii, 176, ftn. 1, C. Frank (Berlin) gives the following figures:—Sunnites, 220 million, Shi'ites, 10 million. This work out at about 5%.



Of the Shi'ite sects today, the Zaidis are represented in south Arabia, mostly in Yemen, and they exhibit a curious and interesting fusion of Shi'ite and Sunnite principles. It will be seen from the genealogical table that the first principal difference among the Shi'ites arose after the fourth Imam, Zainu'l-'Abidin. One of his sons, Zaid (d. A.H. 122) was accepted as Imam by certain people. Thus arose the present Zaidi sect. To this Zaid is attributed the *Majmu'u'l-Fiqh,* the oldest extant manual of Muslim Law,

Malik's *Muwatta'* being the second in point of time.[1] It has been recently edited by Griffini in Milan, 1919. The majority however followed Imam Muhammad al-Baqir, and after him Imam Ja'far as-Sadiq, who is distinguished not merely as Imam of the Shi'ites, but also as a man very well versed in law and science. After the death of Imam Ja'far, again a difference arose, the majority following Imam Musa Kazim and through him six other Imams, thus making the twelve Imams of the sect known as Twelvers (in Arabic, *Ithna 'Ashari*).

The minority, after the death of Imam Ja'far, the sixth Imam, did not acknowledge Imam Musa Kazim but adhered to the claims of his elder brother Isma'il and are today known as Isma'ilis; they consist in India of two main groups, (i) the Khojas, or *Eastern* Isma'ilis, representing the followers of the present Aga Khan, Sultan Muhammad Shah, who is believed to be the forty-eighth Imam in the line of the Prophet,[2] and (ii) the *Western* Isma'ilis who are popularly called Bohras, and may be divided into Da'udis and Sulaimanis and various other small groups. It must however be pointed out that the word *bohra* merely means a 'merchant', and does not signify any particular school of Mahomedan Law.[3]

[1] Goldziher on '*Fiqh*', *Ency. of Islam*, ii, 103. Strothmann, it must be noted, has given us two careful and thorough studies of Zaidi law.

[2] Cf. 'Ismailiya', *Ency. of Islam*, ii, 549; W. Ivanow, *Ismailitica*, 69, 76; for History, see *Adv.-Genl.* v. *Muhammad Husain Huseni* (known as the *Aga Khan Case*), (1866) 12 Bom. H. C. R. 323, and *Haji Bibi* v *H. H. Sir Sultan Mahomed Shah, the Aga Khan* (1908) 11 Bom. L. R 409. The first case lays down that Khojas are Isma'ilis and not Sunnites; the second makes it clear that they are not Ithna 'Asharis, and distinguishes between the Seveners and the Twelvers.

[3] Cf. 'Bohoras', *Ency of Islam*, i, 738. For the history, tenets and books of the Da'udi Bohras, and the powers of the Mullaji Saheb, their *Da'i'l-Mutlaq*, see *Adv.-Gen.* v. *Yusfalli* (1921) 24 Bom. L. Rep. 1060. Our knowledge of the Isma'ili law is very meagre; Tyabji, *Muh. Law*, 2nd ed., 33. Their chief legal text, *Da'a'imu'l-Islam*, has not yet been edited or translated; but two extracts with translations have been published by me: (i) on *Bequests to Heirs* in (1929) Jl. Bom. Br. R. A. S., 141, and (1929) 31 Bom. Law Rep. Jl., 84, and (ii) on *Mut'a* in (1931) 33 Bom Law Rep. Jl., 30. On both these points the Isma'ili law agrees with the Hanafi rule.

There are Hindu Bohras, Sunni Bohras of Rander and other Bohras of the Isma'ili religion. The Eastern Isma'ilis are also to be found in Central Asia, Persia, and the Frontier Provinces. The Western Ismailis are spread over Syria, Southern Arabia and round the Persian Gulf.

The majority of the Shi'a belong to the Ithna 'Ashari school. It is the religion of the ruling house of Persia, and a number of princely families in India also belong to that persuasion. Some of the Nawabs of Lucknow, Murshidabad and the Deccan follow this school, and this branch of Muslim law is well known and recognized in British India. Only recently Mr. Justice Sulaiman of the Allahabad High Court laid down that 'Shia' Law (*Ithna 'Ashari*) was as much the law of British India as any other branch of the law, and that therefore he would not allow any experts or Mujtahids to go into the box and give expert evidence on it as if it were a branch of foreign law.[1]

§ 7. IMAMAT: SHI'ITE NOTION OF LAW

The fundamental difference between the Shi'ite and the Sunnite system is the doctrine of Imamat developed by the former. According to the Sunnite doctrine, the leader of the Muslims at any given moment is the *Khalifa* or Caliph, literally, the 'successor' of the Prophet. He is more of a temporal ruler than a religious chief; for in religious matters he has simply to follow the path of *Shari'at*. He is a mere mortal; he must possess certain qualifications for election to his high office, and remains Caliph so long as he performs his duties in accordance with the law; if he is found unfit, he may be deprived of the Caliphate.[2]

The concept of *Imam* (lit. one who goes before, leader) among the Shi'a, however, is totally different.[3] Here temporal affairs take a secondary place; the Imam is the final

[1] *Aziz Bano* v. *Mahomed Ibrahim*, (1925) 47 All. 823, 835.
[2] Arnold, *The Caliphate*, 71-72; *Ency. of Islam*, ii, 881.
[3] Definition and conditions of Imamat, *al-Babu'l-Hadi 'Ashar*, § 174.

interpreter of the law on earth. He is 'leader' not by the suffrage of the people, but by Divine Right, because he is a descendant of the Prophet—or rather of 'Ali. In some sects like the Zaidis and the Ibadis, he is merely a human being; in others, like the Ithna 'Asharis, the Twelfth Imam partakes of the Divine Essence. He is the *Gha'ib* and *Muntazar* —'he who has vanished' and 'he who is awaited'—but he lives and is deathless, and will appear at a pre-ordained time and 'will fill the earth with justice just as it is [now] full of injustice'.[1] Among the Western Isma'ilis, the Imam is '*mastur*', hidden, from the sight of the uninitiated, but not immortal. On account of persecution, one of the earlier Imams went into hiding; his descendants have continued to rule over the true believers to this day, and will go on doing so for ever, but he can only be recognized by the higher Initiates, the *Da'is*. The Eastern Isma'ilis identify their Imam, for all practical purposes, with God; they hold that 'Ali was more God than man, while the Prophet is given a secondary position to him as *Hujjat*.[2] The 'Ali Ilahis and the Druzes are even more frankly believers in the principles of incarnation and epiphany.

The Imam of the Shi'a is therefore similar in some respects to the *Qutb* or *Insanu'l-Kamil* of the Sufis, the *Bab* of the Babis, and the *Ghauth* of the Dervishes. Originally the Imam, being a descendant of 'Ali, was supposed to be the repository of the secret doctrines and teaching of Islam imparted by the Prophet to his favourite son-in-law. But later, in Islam as in many other faiths, the simplicity of the original creed apparently failed to satisfy certain spiritually-minded and philosophically-inclined men; in particular, the urge to find an intermediary between Man and God—partaking of the essence of both, not quite God and yet greater somehow than Man—was deeply felt.

It is needless to go into the other doctrinal differences between Shi'ites and Sunnites. Those interested in the sub-

[1] Definition and conditions of Imamat, *al-Babu'l-Hadi 'Ashar*, § 211 (last lines).

[2] Ivanow, *Ismailitica*, 68. This, it seems, is not usual *Salman-i Farsi* is ordinarily the Hujjat of 'Ali

ject may refer to a typically Sunnite creed, that of al-Ash'ari or of an-Nasafi for example,[1] and compare it with *al-Babu'l-Hadi 'Ashar* by 'Allama-i-Hilli, a concise statement of the Ithna 'Ashari faith.[2] But one particular Shi'ite theory, the distinction between *Iman* and *Islam*, may be mentioned, because it was recently discussed in a court of law with reference to the validity of marriages between Shi'ites and Sunnites. The Shi'ites, relying on a text of the Qur'an,[3] say that the two words are not synonymous, and in this respect differ from the Sunnites.[4] Mankind may be divided first into two classes: Believers (*Muslims*) and non-Believers (*Ghair Muslims*). Muslims should again be divided into *Mu'mins* (possessors of *Iman*, true believers) and *Muslims*, the generality of believers. Belief in one God and the apostleship of Muhammad constitutes *Islam*,[5] and those who accept this are Muslims. But *Iman* consists of, firstly, *Islam*, acceptance of the above dogma, plus secondly, *knowledge* of the true faith, consisting of the belief in a God-appointed, necessarily-existent, and sinless (*ma'sum*) Imam, and the theory of Imamat;[6] and thirdly, possibly also, *action* in accordance with this true belief. Islam therefore is the wider circle; *iman*, the narrower one: a *mu'min* is necessarily also a *muslim*, but a *muslim* is not necessarily a *mu'min*. Islam is the religion of the multitude; *iman*, the faith of the chosen few. Islam —say the Shi'a—is the religion of the Prophet in its ordinary form; *iman* is the name of its essence, its more perfect part, its nobler form.

This doctrine assumes importance when considered in relation to the law of marriage or *nikah*. The argument

[1] Trans. by D. B. Macdonald in his *Muslim Theology, Jurisprudence and Constitutional Theory*, App. i, London and New York, 1903.

[2] Trans. by W. M. Miller, London, R. A. S., 1928.

[3] Qur'an, ed. Flugel, **49**, 14; *al-Babu'l-Hadi 'Ashar*, § 19 and note

[4] Article on *'Iman'*, in *Ency. of Islam*, ii, 474; Macdonald, *Muslim Theo.*, 312.

[5] *Naraniakath* v. *Parakkal*, (1922) 45 Mad 986, 991, 1001.

[6] *al-Babu'l-Hadi 'Ashar*, § 179; for a philosophical definition of *Imam*, see *Rasa'il Ikhwanu's-Safa'*. Cairo, 1928|1347, iv, 128.

may be stated as follows: a Muslim man may validly marry a non-Muslim woman under certain circumstances,[1] but a Muslim woman cannot under any circumstances marry a non-Muslim man. A man, say the doctors of the law, may under given conditions marry a woman who in faith is his inferior; not so the woman—she can only marry an equal (*kuf'*). Hence, say the Shi'ites, a *Mu'min* (Shi'ite) man may marry a *Muslim* (Sunnite or Shi'ite) woman; but a *Mu'min* woman cannot marry anyone but a *Mu'min* man. This peculiar contention was raised by an Ithna 'Ashari wife against her Hanafi husband in a well-known Allahabad case recently;[2] but Mr. Justice Sulaiman, in a learned and elaborate judgment based on the authority of the leading Shi'ite text, *Shara'i'u'l-Islam* (popularly called Sharaya-ool-Islam, and even Suraya), disallowed it, and held that such a marriage was, from the view-point of the Shi'a, perfectly valid in law, although the pious may consider it undesirable or *makruh*. The reverse case does not arise at all, because Sunnites make no such distinction between *Islam* and *Iman*, and the validity of the marriage of a Sunnite woman with a Shi'ite man is now, so far as the Indian Courts are concerned, beyond dispute.[3]

What therefore is the definition of the law according to the Shi'a? They certainly accept the authority of the Qur'an, the Word of God, and the *Sunnat* of the Prophet. No Hadith is ordinarily accepted by them unless related by the Imams descended from the Prophet. But they say that only the Imam, and in his absence the *Mujtahids*,[4] his servants and teachers of the True Faith, can tell us what the correct interpretation of the law is. The Imam is the law-giver himself, the speaking (*natiq*) Qur'an; he may in a proper case even legislate, make new

[1] He may marry a *Kitabia*, for example—that is, a Jewish or a Christian woman.

[2] *Aziz Bano* v. *Md. Ibrahim*, (1925) 47 All. 823, 825, 836

[3] Mulla, *Mahomedan Law*, 9th ed., § 199A.

[4] The Shi'ite *Mujtahids* are in fact very similar to the Sunnite *Qadis* (Kazis). For an account of Mujtahids, their course of studies and other information, see *Ueber den Schiitischen Mudschtahid* by C. Frank, in *Islamica*, 1926, ii, 171-192.

laws and abrogate old ones; but as he is Hidden or Evanescent, the Mujtahids, who are present at all times and in each country, are his agents, the recognized interpreters of the law in accordance with the canonical tradition. *Ijtihad* therefore has an altogether different signification in Shi'ite law; as Macdonald says, 'The Shi'ites still have Mujtahids who are not bound to the words of a Master, but can give decisions on their own responsibility. These seem to have in their hands the teaching power which strictly belongs to the Hidden Imam. They thus represent the principle of authority which is the governing conception of the Shi'a.'[1] Among Sunnites, however, Mujtahids have not existed since the third century of the Hijra; and the doctrine of *Ijtihad* is jealously guarded and strictly construed by them.[2] No matter how learned a scholar may be among the Shi'ites, his opinion has no value unless he attains the rank of a Mujtahid, and therefore derives authority from the Imam and acts on his behalf. The doctrines of Ijma' and Qiyas are therefore of secondary importance. Thus law, in the estimation of the Shi'ite doctors, consists of rules for human conduct, based on the authoritative interpretation of the Qur'an and the Sunnat and the decisions of the Imams by the Mujtahids, who are the servants of the Imam of the time, derive their authority from him, and act in his name.

Apart from the doctrine of Imamat, the difference between the Sunnite and the Shi'ite school is not very great. It will be observed that I have studiously avoided the use of the term 'sect' for the two divisions, because, as has been pointed out by the great Hungarian scholar, Goldziher, there are really no 'sects' in Islam but only 'schools', *Madhahib*, (sing. *Madhhab*), of Muslim Law.[3] Strictly speaking, belief in the one and only God and the apostleship of

[1] Macdonald, *Muslim Theology*, 116.
[2] ibid., 38.
[3] Goldziher, *Vorlesungen*, 1st ed., 51; *Ency. of Islam*, ii, 104.

the Prophet Muhammad are the only two beliefs necessary in Islam.[1] In the theory of the Law all Muslims are brothers and equals, and differences in opinion on questions of law do not constitute them, speaking legally of course, into separate sects of the kind, for example, which we find in Hindu Law.

§ 8. THE LAST PHASE: 'MAHOMEDAN' LAW

Coming down to the times of the Mahomedan supremacy in India, we find that as the Mughal emperors were Hanafis, the Kazis[2] appointed by them administered the Hanafi law. Hanafi law was, in the Mughal times, the law of the land. This continued till the establishment of the British rule; with the advent of the present regime, the influence of English Common Law and the principles of Equity became more and more apparent. The Mahomedan Law was applied as a branch of personal law to those who belonged to the Mahomedan persuasion in accordance with the principles of their own school or sub-school. Now there is a peculiarity in Khojas and Cutchi Memons, two commercial communities in the Bombay Presidency, which must be carefully noted. Although they profess the Islamic faith, in certain matters, for instance the law of succession and inheritance, they follow the Hindus and not the Mahomedans. These communities were originally converts from Hinduism and they still retain in part the old law to which they were subject.[3] Similarly, certain Muslim communities in Madras and the Punjab follow the customary and not the Mahomedan Law in various matters.

In the earlier days of British rule, the influence of Muslim Law, pure and simple, was felt everywhere. Originally the Company had merely the right of collecting the revenue. The administration of justice, civil and criminal, remained as it had been under the Mahomedan

[1] *Narantakath* v. *Parakkal*, 45 Mad. 986.

[2] Strictly *Qadis*. In England *Cadi*, and in India *Kazi* is commonly used.

[3] S. R. Dongerkerry, *The Law Applicable to Khojas and Cutchi Memons*, Bombay, 1929.

rule. The law-officers were mostly Muslims; the criminal law was Muslim; in civil matters, the Muslim Law was applied to Muslims and the Hindu Law to Hindus in accordance with the opinions of Pandits attached to the Courts. This policy was further developed in the British regime, and we have in the famous Regulation II of 1772 the provision that 'in all suits regarding inheritance, succession, marriage and caste and other usages or institutions, the laws of the Koran with respect to Mahomedans, and those of the Shastras with respect to the Gentoos (Hindus), shall be invariably adhered to'.[1]

The Muslim Criminal Law, although successively modified, remained in force somewhat longer; and not till the year 1862, when the Indian Penal Code and the Code of Criminal Procedure came into force, did it entirely disappear. As regards evidence, too, the Muslim Law was not entirely abolished till the passing of the Evidence Act in 1872.

It is needless to go into the history of the various enactments or to show how continuously the law has been and is even now being anglicized. The personal law of the various communities has been applied, until, with differing social conditions, the need for a change is apparent. On the one hand, certain portions of the law were abolished, such as slavery and forfeiture of rights on apostasy; and at the same time, newer ideas have been developed. In certain cases, for example, the Wakf Act of 1913, where the Courts had wrongly decided certain rules regarding Wakfs or religious endowments, to lineal descendants, the Legislature intervened and passed an Act by which the original rules of Muslim Law were made applicable.[2] The result is that today the Mahomedan Law of Inheritance and Succession, Wills, Gifts, Wakfs, Marriage, Divorce, Dower, Legitimacy and Guardianship is applied to Muslims every-

[1] Wilson, *Anglo-Muhammadan Law*, 6th ed., 25 *et seq.*

[2] This Act was originally not retrospective. Recently, by another Act, XXXII of 1930, it has been made so, and therefore the original rules of Muslim law now apply to Wakfs, whatever the date of their creation.

where in India. The law of Pre-emption is not applicable in Madras; but it is applied elsewhere, and, in some instances, in the north of India, even to Hindus by custom.

And here it must not be forgotten that the Mahomedan Law to be applied in India is the law that is to be found in well-known legal texts, such as the *Hidaya* and the *Fatawa 'Alamgiri* and others which have acquired a special kind of authority in India; new rules of law cannot now be deduced by lawyers of eminence. It is for this reason that their Lordships of the Privy Council in an important case said that they 'have endeavoured to the best of their ability to ascertain and apply the Mahomedan Law, *as known and administered in India*'.[1] They did not rely in that case on 'the opinion of that learned Mahomedan lawyer' (Ameer Ali, J.) which was founded on 'texts of an abstract character and upon precedents very imperfectly stated'. In another leading case, overruling the opinion of so great a judge as Mahmood, J., Sir Arthur Wilson said, 'In *Abul Fata* v. *Russomoy Dhur Chowdhury*, in the judgment of this Committee delivered by Lord Hobhouse, the danger was pointed out of relying upon ancient texts of the Mahomedan Law, and even precepts of the Prophet himself, of taking them literally, and deducing from them new rules of law, especially when such proposed rules do not conduce to substantial justice. That danger is equally great whether reliance be placed upon fresh texts newly brought to light, or upon logical inferences newly drawn from old and undisputed texts. Their Lordships think it would be extremely dangerous to accept as a general principle that new rules of law are to be introduced because they seem to lawyers of the present day to follow logically from ancient texts however authoritative, when the ancient doctors of the law have not themselves drawn those conclusions.'[2]

[1] *Abul Fata* v. *Russomoy Dhur Chowdhury*, (1894) 22 Ind. App. 76 at 86, 87.

[2] *Baker Ali Khan* v. *Anjuman Ara Begum*, (1903) 30 Ind. App 94 at 111, 112.

From the general history of legislation in these matters, two conflicting sets of principles arise. Firstly, as far as possible, Government does not wish to interfere with the personal law of the various communities, as it would tend to create great dissatisfaction; and secondly, changing social conditions, the effect of European education, the contact in commercial and other centres with Europeans and their legal notions—in sum, modern civilization—produce a desire in the minds of many to see that reforms are carried out. This can only be done by appropriate legislation; but the task is not easy. Even in the case of such legislation as the recent Sarda Act (for raising the age of consent for marriage) there are large numbers of both Hindus and Mahomedans whose religious susceptibilities have been touched. Reform, therefore, becomes a matter of difficulty.

It is sometimes suggested that the Mahomedan Law in India should be codified. In theory this is easy; we have only to bring together a dozen men learned in the various branches of Muslim Law, and draft a Code giving us the law in the shape of clear-cut propositions. This has been done both in Egypt and Turkey with success; why not here too? To the reformer this would be a great opportunity for doing away with everything suggesting a state of affairs that flourished some centuries ago and breaking off with the past. But, in the first place, the members of each community would desire their own particular rules to be applied to them; secondly, so few of our legal texts have been critically edited in the original Arabic or translated accurately into any language, English or vernacular, that the discovery of the proper rules in certain branches of the law would involve considerable research; and for that time and money would be needed.

To all these difficult questions no hard and fast answers can be given. The rising tide of nationalism may result in the death of old prejudices and bring about greater uniformity in ideals.

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One of the most penetrating modern discussions of Islamic Law is contained in the course of three lectures delivered in the University of London by Count Léon Ostrorog on *The Angora Reform* in 1927. His admiration for the system is unbounded; and I might fitly conclude by adopting his words: 'Considered from the point of view of its logical structure, the system (Muslim Law) is one of rare perfection, and to this day it commands the admiration of the student. Once the dogma of the revelation to the Prophet is admitted as postulate, it is difficult to find a flaw in the long series of deductions, so unimpeachable do they appear from the point of view of Formal Logic and of the rules of Arabic Grammar. If the contents of that logical fabric are examined, some theories command not only admiration but surprise. Those Eastern thinkers of the IXth century laid down, on the basis of their theology, the principle of the Rights of Man, in those very terms, comprehending the rights of individual liberty, and of inviolability of person and property; described the supreme power in Islam, or Califate, as based on a contract, implying conditions of capacity and performance, and subject to cancellation if the conditions under the contract were not fulfilled; elaborated a Law of War of which the humane, chivalrous prescriptions would have put to the blush certain belligerents in the Great War; expounded a doctrine of toleration of non-Moslem creeds so liberal that our West had to wait a thousand years before seeing equivalent principles adopted. Such a height and scope of conceptions may well have sufficed to inspire silent submission in any minds not endowed with constructive genius to an equal degree; but events moreover occurred that seem to have exerted the influence of a crushing and decisive factor.'[1]

[1] Ostrorog, *The Angora Reform*, 30-31.

SELECT BIBLIOGRAPHY

(a) *Introductory:*

1. Count Léon Ostrorog, *The Angora Reform.* London, 1927. Lecture I, 'The Roots of the Law'.
2. *Encylopædia Britannica,* 13th ed., 1926, Vol. 17, p. 414: D. B. Macdonald on *Mahommedan Law.*[1]
3. D. B. Macdonald, *Development of Muslim Theology, Jurisprudence and Constitutional Theory.* London, 1903.
4. Ignaz Goldziher, *Vorlesungen über den Islam.* Heidelberg, 1910; 2nd edition, 1925. Trans. into French by F. Arin under the title of *Le dogme et la loi de l'islam.* Paris, 1920.
5. H. Lammens, *L'Islam: Croyances et Institutions.* Beyrouth, 1926. Trans. into English by E. Denison Ross, London, 1929. Chapter V, on Jurisprudence.

(b) *General Discussion:*

1. Articles on *Shari'a, Fiqh, Shi'a,* etc. in the *Encyclopædia of Islam,* by M. Th. Houtsma and others. Leiden-London, 1913..... This invaluable work is issued in English, French and German simultaneously; I have referred to the English edition. In course of publication.
2. Th. W. Juynboll on 'Law' (Muhammadan) in Hastings's *Encyclopædia of Religion and Ethics,* Vol. VII, pp. 858-883.
3. Th. W. Juynboll, *Handbuch des islamischen Gesetzes.* Leiden-Leipzig, 1910.

[1] I have not referred to the article on 'Islamic Law' in the *Ency. Brit.,* 14th ed., 1929, xii, 714, because not only is it no improvement on Macdonald's article in the previous edition, but is unfortunately distinctly worse.

4. Abdur Rahim, *Muhammadan Jurisprudence.* (Tagore Law Lectures, 1907.) Madras, 1911.

5. N. P. Aghnides, *Mohammedan Theories of Finance with an Introduction to Mohammedan Law and a Bibliography.* New York, 1916.

(c) *History of* Fiqh:

There is no proper treatment of the history of *Fiqh.* In addition to the various articles in the *Ency. of Islam,* the following work may be referred to:—

Muhammad al-Khidri, *Ta'rikhu't-Tashri'i'l-Islami,* 3rd ed., Cairo, 1930|1348. (An abridged Urdu trans. under the title of *Tarikh-i Fiqh-i Islami* was published by Maulana 'Abdu's-Salam Nadawi, in Azamgadh, U.P., A.H. 1346.)

(d) *Bibliography:*

For European works:

1. D. G. Pfannmüller, *Handbuch des Islam-Literatur.* Berlin-Leipzig, 1923, pp. 235-255.

2. Th. W. Juynboll, *Handbuch des islamischen Gesetzes.* Leiden-Leipzig, 1910.

On particular topics:

3. *The Encyclopædia of Islam.*

4. *Der Islam,* 1923, xiii, pp. 349-355.

For original texts:

5. N. P. Aghnides, 'Introduction to Mohammedan Law' (in *Mohammedan Theories of Finance*). New York, 1916.

The bibliography in Tyabji's *Principles of Muhammadan Law,* 2nd ed., p. 75, Bombay, 1919, is taken from Morley's *Digest* and may also be consulted.